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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROY RICHARD ERICKSON, Defendant and Appellant.	B154138 (Super. Ct. No. MA021780)

APPEAL from a judgment of the Superior Court of Los Angeles County, David S. Wesley, Judge. Affirmed as modified.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, and Kenneth N. Sokoler, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant, Roy Richard Erickson, appeals from the judgment entered following his conviction, by jury trial, for assault on a police officer, aggravated assault on a police officer and making terrorist threats (Pen. Code, §§ 241, subd. (b); 245, subd. (c), 422).[1] Sentenced to a state prison term of five years and five months, Erickson contends there was trial error. The People contend there was sentencing error.

The judgment is affirmed as modified.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

On the night of May 2, 2000, Los Angeles County Deputy Sheriff John Christie responded to a call regarding a family disturbance at the Palmdale house where defendant Erickson lived with his mother Carmen, his brother Leroy and his sister Rosalie. Carmen was outside; she complained that Erickson had pushed her out of the house. Christie and other deputies went in to look for Erickson, but they didn't find him. Carmen showed Christie a photograph of Erickson. A warrant check revealed Erickson had two outstanding traffic warrants. Christie left the Erickson house about 8:00 p.m.

That same night, Geraldo J., Jose F., Alex P., Hector M. and Jose G. were at Geraldo's house. They were in a band and they were practicing in the garage. Around 8:00 p.m., Carmen came over to Geraldo's house and called the police. When Erickson showed up at Geraldo's house, Carmen looked scared. Erickson begged her not to call

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[1] All further statutory references are to the Penal Code unless otherwise specified.

the police. When it looked like Erickson was going to grab her, the band members intervened and pushed him out the door. Erickson threatened to kill them and then left. A few minutes later, Erickson's brother Leroy approached Geraldo's house. Jose F. saw Leroy drop a big knife, pick it up and put it into his waistband. Leroy asked Geraldo what they had done to his brother. Geraldo explained they had thrown Erickson out of the house because they thought he was going to hit Carmen. Leroy and Geraldo shook hands, and Leroy left.

At about 8:30 p.m., Christie responded to a second disturbance call involving the Ericksons. Deputy William McCormick responded as well. As Christie and McCormick neared the house, they saw Erickson and Leroy. Christie recognized Erickson from Carmen's photograph. Erickson had a beer in his hand. Christie, intending to arrest Erickson for the outstanding warrants, asked Erickson and Leroy to step over to his patrol car. The brothers did not comply. Leroy cursed at the deputies and said they had no right to stop him. The deputies told Erickson to put his beer down. Erickson defiantly took a sip. McCormick told Erickson to put the beer down or "get sprayed." Christie took out his pepper spray and shook it. Leroy said, "Don't spray anyone, man, you ain't gonna spray anybody," and walked towards Erickson. When Erickson reached into his jacket, Christie sprayed him. Leroy grabbed the beer can from Erickson and threw it at Christie, hitting him in the knee. Christie sprayed Leroy. Leroy started jogging away, while Erickson advanced on Christie. Erickson tried to grab Christie, hitting him in the chest with enough force to push him backwards. Christie sprayed Erickson again and pushed him away. Meanwhile, McCormick had gone after Leroy and grabbed him. Leroy took

out his knife and stabbed McCormick. They fell to the ground, with Leroy on top. Christie hit Leroy on the head with his flashlight, and McCormick managed to free himself and draw his gun. Erickson ran up, saying, "Don't do that to my brother. I'm gonna kick your ass." Erickson looked like he was trying to reach into his jacket again, so Christie sprayed him. McCormick pointed his gun at Erickson and ordered him to the ground. Erickson turned and ran; later that night, he was found hiding in a garage a mile away. McCormick was hospitalized for the stab wound.

Erickson spoke to Detectives Ross and Machanic at the Palmdale sheriff's station. The conversation was tape-recorded, but the tape ran out before their talk ended. According to Ross, Erickson initially denied he or Leroy had thrown the beer can, but later he said the beer might have fallen and splashed on the deputies. At first, Erickson said he didn't know Leroy had a knife, but he later admitted he did know. He initially denied approaching Leroy and McCormack when they were on the ground, but he later admitted going to Leroy's aid. Erickson said he wanted to help Leroy and that he would have killed the deputies if he had to. He didn't do so because he was pepper-sprayed.

The jury also heard about an incident that occurred in 1993. Greg M. saw Erickson and Richard V. trying to break into a house. Greg and David G. chased, caught and tried to detain them. Erickson told Greg he would "cap" him – meaning kill him – if Greg didn't let them go. Greg and David let them go. As Erickson left, he said, "I'll get you back. I know where you live." About 15 minutes later, Richard came back with Leroy; Erickson wasn't with them. Leroy asked why they had beaten his brother up. Greg and David denied beating Erickson, and said they were just trying to stop him from

breaking into a house. Suddenly, Leroy pulled out a knife and stabbed David in the chest. Leroy was convicted for this assault and given a six-year prison sentence. Erickson was not charged.

2. *Defense evidence.*

Carmen testified she initially tried to call the police that night when she discovered Erickson and Leroy had been drinking. She didn't want Erickson drinking because he was on probation and because he got aggressive and belligerent when he was drunk. She didn't want Leroy to drink because he had been behaving so oddly after getting out of prison; he didn't seem to understand what was going on around him. A doctor at the parole office told her Leroy was borderline schizophrenic. He was supposed to be taking medication, but he had stopped because it gave him headaches. After Erickson took the phone away from her, she left the house, borrowed a neighbor's phone and called the police back. By the time the police came, Erickson and Leroy had left the house. When Carmen saw them returning, she went to Geraldo's house; Erickson followed her there.

Erickson's sister Rosalie testified that after Leroy got out of prison, and during the period immediately preceding this incident, he behaved irrationally (talking to himself; coloring pictures on the walls) and refused to take medicine the doctors had prescribed.

Erickson testified on his own behalf. He and Leroy had been drinking beer in the park that afternoon. Erickson drank 12 or 15 beers. They went home and when Carmen saw Erickson putting the leftover beer in the refrigerator she called the police. Erickson grabbed the phone from her because he "had just got out of rehab" and he "didn't want to go get locked up again." When he saw that the police had arrived, he and Leroy fled over

the back fence. Erickson later followed Carmen to Geraldo's house, where he yelled and pleaded with her not to call the police. When he got thrown out of Geraldo's house, he was hit in the face and choked. Erickson testified he did not recall threatening to kill anyone. When he got back home, Leroy asked what happened and Erickson said the neighbors had choked him. Leroy got excited and wanted to go back and "fuck them up." Erickson told him not to. He didn't see Leroy get a knife and he didn't realize Leroy had gone to Geraldo's house. Erickson admitted knowing Leroy was a gang member.

They encountered Christie and McCormick when they left the house. Erickson at first tried to keep his beer out of sight, but then he unthinkingly took a sip. Christie told him to put the beer down as he was drinking it, not before. Then Leroy grabbed the beer from Erickson and tossed it underhand at the deputies; it hit McCormick. Leroy started running and McCormick chased him. After Christie sprayed him, Erickson could barely see. He could tell that Leroy and McCormack were on the ground. He left because he figured Leroy would be arrested and that would be the end of it.

Erickson testified Leroy was a "walking zombie" and behaved very strangely after getting out of prison.

3. *Rebuttal evidence.*

Detective Machanic interrogated Leroy the night of the incident. Leroy appeared to understand the *Miranda* advisement and he was able to answer Machanic's questions intelligently and coherently. When Erickson was captured that night, he said he saw the deputies "beating [Leroy] up, and that he went to his brother's aid with the intent of either assaulting the deputies, and if necessary, killing them to assist his brother to get

away . . . because it appeared they were hurting his brother pretty good, because they were hitting him with their flashlights." The next day, Erickson initially denied coming to Leroy's aid, but he later repeated his prior admission. Erickson also initially denied knowing Leroy had a knife when he went to Geraldo's house, but later he admitted seeing Leroy take a kitchen knife and conceal it under his coat.

CONTENTIONS

1. The trial court failed to conduct an adequate *Marsden* inquiry.

2. The trial court erred by admitting improper character evidence.

3. Trial counsel rendered ineffective assistance by making a closing argument that contradicted Erickson's testimony.

4. The trial court erred by failing to conduct an adequate inquiry into possible jury misconduct.

5. The trial court erred by failing to give a unanimity instruction.

6. The trial court erred by giving CALJIC No. 17.41.1.

7. The trial court erred by failing to impose a parole revocation fine.

DISCUSSION

1. *Marsden inquiry*.

Erickson contends the trial court erred by failing to hold a *Marsden*[2] hearing after he complained about defense counsel's inadequate representation. This claim is meritless.

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[2] *People v. Marsden* (1970) 2 Cal.3d 118.

"*Marsden* motions are subject to the following well-established rules. ' " 'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].' [Citations.]" ' " (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.) "[A] trial court's duty to permit a defendant to state his reasons for dissatisfaction with his attorney arises when the defendant in some manner moves to discharge his current counsel. The mere fact that there appears to be a difference of opinion between a defendant and his attorney over trial tactics does not place a court under a duty to hold a *Marsden* hearing. [¶] There is no constitutional right to an attorney who would conduct the defense of the case in accord with the whims of an indigent defendant. [Citations.] Nor does a disagreement between defendant and appointed counsel concerning trial tactics necessarily compel the appointment of another attorney." (*People v. Lucky* (1988) 45 Cal.3d 259, 281-282, fn. omitted.) "We do not necessarily require a proper and formal legal motion, but at least some clear indication by defendant that he wants a substitute attorney." (*Id.* at p. 281, fn. 8; see also *People v. Rivers* (1994) 20 Cal.App.4th 1040, 1051, fn. 7 [*Marsden* request must be clear and unequivocal].)

Erickson asserts he requested substitute counsel during the following midtrial colloquy. The trial court was inquiring about Erickson's decision to testify, saying it wanted "to be sure that the defendant understood his rights and also the liabilities of testifying or not testifying." Defense counsel said he had advised Erickson not to testify because he didn't think it was necessary. The trial court commented: "I know your defense is premised upon the fact that your client did not have the requisite knowledge or mental state to come within the definition of the crimes charged, that the main actor was Leroy Erickson, not Roy Erickson. And I understand your tactics fully." The court then told Erickson: "You know you have the right to testify. You also have a right not to testify. Any time you take the witness stand, you are subjecting yourself to cross-examination by an attorney, who is experienced and trained in the areas of criminal law." Erickson replied: "I believe I have to take the stand, because so far my attorney hasn't done anything, as far as I am concerned, and built a strong case for my defense. [¶] So I believe I am going to have to get up there and tell the story because if I don't right now, it looks like the jury will hang me for something I did not do." Defense counsel said he and Erickson had disagreed about strategy, particularly regarding "tactics in terms of cross-examining law enforcement officers." The trial court commented: "It's abundantly clear to me what you are trying to achieve." Erickson then told the court: ". . . I asked him to ask a lot of questions to witnesses that he never asked. You know, and he doesn't tell you the truth. [¶] I tried to fire him a dozen times already, but that didn't work. I tried to go pro per. All that got denied. Because I don't believe he is doing his job, . . . " The

trial court replied: "I have seen nothing in his defense of your case that suggests in any way he is derelict in his duties."

Erickson argues the trial court was required to undertake a formal *Marsden* inquiry, because "he complained . . . about his counsel's total failure to take any steps to defend the case," and that the trial court improperly accepted counsel's explanations "at face value." We cannot agree. Erickson did not ask to have counsel discharged; at most, he made reference to a past attempt to discharge counsel. The entire colloquy only took place because the trial court wanted to insure Erickson understood he did not have to testify. Thus, there was no clear indication Erickson was now requesting substitute counsel. The record plainly reveals the trial court did not accept defense counsel's explanations without scrutiny, and obviously there was no "total failure" to defend the case inasmuch as defense counsel made an opening argument, cross-examined prosecution witnesses, put on defense witnesses, and gave a closing argument. Moreover, Erickson was *acquitted* of the following charges: conspiracy to commit murder; conspiracy to commit assault with a deadly weapon; attempted murder; and, aggravated assault on an officer. Erickson's complaints about defense counsel reveal no more than a disagreement over trial tactics, which is not adequate justification for substituting appointed counsel. The trial court did not err by failing to make a formal *Marsden* inquiry.

2. *Improperly admitted evidence.*

Erickson contends the trial court erroneously admitted evidence that showed his bad character. Conceding that much of this evidence was unobjected to, he also contends trial counsel was ineffective for having failed to object. These claims are meritless.

Erickson contends the trial court erroneously admitted evidence he had served time in jail. However, none of the cited evidence actually purported to establish that Erickson had been in jail. Although Deputy Christie testified that, when Carmen showed him Erickson's picture, he observed that Erickson was big and asked if he "was ever in trouble with law enforcement. And [Carmen] said, yes, he's been in trouble quite often." Being "in trouble" with law enforcement is not the same as having been incarcerated. Moreover, the prosecutor immediately said, "Your honor, offered for the state of mind of the deputy not for any character," and Christie's ensuing testimony made it clear he had asked because he wanted to know what to expect if he ran into Erickson. In any event, Christie's knowledge of Erickson's prior trouble with law enforcement was relevant to determining the reasonableness of the force Christie used in detaining him. "[W]hen a statute makes it a crime to commit any act against a peace officer engaged in the performance of his or her duties, part of the corpus delicti of the offense is that the officer was acting lawfully at the time the offense was committed." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020.)

Next, Erickson contends the trial court erred by admitting evidence of his gang affiliation. At the very beginning of Detective Ross's testimony, he was asked how he came to be involved in the case and he explained it had been assigned to Detective

Machanic, and that "[t]he two of us handle all gang-related assigned crimes" in Palmdale. Ross did not say Erickson was a gang member; the evidence showed Leroy was a gang member. Later, Ross testified that although Erickson said during the taped portion of the interrogation that he did not associate with a white street gang, Ross testified the fact Erickson had a "White Pride" tattoo indicated he was involved with the Peckerwood Gang. The prosecution introduced photos showing Erickson had the word "White" tattooed on one arm and the word "Pride" tattooed on the other. This evidence was admissible to impeach Erickson.[3]

Finally, Erickson contends the trial court erred by admitting testimony regarding the 1993 incident in which Leroy stabbed David G. There was no error. Erickson was being prosecuted as an accomplice for Leroy's stabbing of McCormick and for Leroy's throwing the beer can at Christie. The 1993 incident showed Erickson was aware of Leroy's violent tendencies, particularly if he believed someone had wronged Erickson, and this arguably proved accomplice liability on the basis of the natural and probable consequences doctrine. The evidence was also admissible to show intent and common scheme. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 401-402 ["[E]vidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the

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[3] Defense counsel put the tape recording of Erickson's interrogation into evidence because the prosecution theory was that he had lied during the taped portion, but had subsequently been truthful during the untaped portion when he made inculpatory statements. This was a valid tactical decision, given that the taped portion contained Erickson's exculpatory statements (he denied knowing about the knife, denied approaching McCormick and Leroy as they were fighting, and asserted he had tried to discourage Leroy from going to Geraldo's house), while his inculpatory statements were not on the tape.

charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan."]; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1049 [prior offenses relevant to prove intent element of kidnap for robbery where defendant's actions during current offense were ambiguous].)

3. *Ineffective assistance of counsel.*

Erickson contends defense counsel was ineffective because, during closing argument, he contradicted Erickson's trial testimony. This claim is meritless.

During closing argument, defense counsel said: "Now, [the prosecutor] is going to come up and say it's very clear that [Erickson] was resisting, obstructing or delaying because what did he do? He took the beer, he drank it, clearly against the instructions of the deputies. I'll have to concede that they told him to take the beer down. [¶] Mr. Erickson testified though that he was sprayed after he took the drink of the can of beer." Erickson claims this constituted ineffective assistance of counsel because it contradicted his testimony that he drank from the beer can before he was told to put it down. However, defense counsel's statement about when Erickson sipped the beer is not unambiguous, having been prefaced by the remark, 'Now, the prosecutor is going to tell you . . . .' In any event, the point of defense counsel's argument was to rebut the prosecutor's theory that Erickson had aided and abetted Leroy's conduct. Hence, defense counsel continued: "But where is the evidence of [Erickson's] intent on behalf of Leroy's resisting, obstructing, or assaulting a police officer? [¶] Nothing. It's an independent action, an intervening cause, and we'll get into this. It gets very complicated. An intervening cause of what happened here, because . . . , if [Erickson]

was resisting or delaying, you can't take the next step, well, because he resisted or delayed, therefore he's responsible for the attempted murder of Deputy McCormick. That is so far reaching, ladies and gentlemen, I'm asking you to use your common sense here." "Ladies and gentlemen, believe me, I'm asking you to use your common sense. What you have here is just [Erickson] being belligerent to the officer when he's drinking beer."

Erickson claims counsel also contradicted his testimony by implicitly conceding during closing argument that Erickson had threatened to kill his neighbors. However, as Erickson acknowledges, he did not actually deny making the threats – he only testified he did not remember doing it. On the other hand, Jose F., Alex P. and Geraldo J. all testified Erickson threatened to kill them. In light of this evidence, it was not ineffective for defense counsel to focus the jury's attention on the fact that one of the witnesses testified he thought Erickson "was just blowing off steam," and by arguing Erickson was too drunk to have had the specific intent required for an illegal threat. This did not constitute ineffective assistance of counsel.

4. *Juror misconduct*.

Erickson contends the trial court erred by failing to conduct a sufficient inquiry into possible juror misconduct. This claim is meritless.

A court on notice of possible juror misconduct must make sufficient inquiry to determine if the juror should be discharged and whether the impartiality of other jurors was affected. (*People v. Espinoza* (1992) 3 Cal.4th 806, 822.) Here, the trial court conducted an inquiry when it learned that one of the witnesses – Erickson's mother

Carmen – might have said something about the case within earshot of several jurors. Juror No. 11 reported: "I was walking in the morning down by the entrance of the building. The mother [i.e., Carmen] was speaking with somebody about the state of Leroy and his mental state and -- [¶] [The Court]: Were there other jurors present at that time? [¶] [Juror No. 11]: There was one behind, but I don't know if he heard anything." Asked for the basic substance of what she overheard, Juror No. 11 said: "Just -- it wasn't all that important. It was just kind -- she just mentioned that is what we were saying about his mental state." Asked by the trial court if hearing this "affected [you] in such a way that you would be unable to be a fair juror to either [side]?" Juror No. 11 said, "I don't think so."

Next, one of the alternate jurors reported he had been walking up to the courthouse with Juror No. 11 that morning. "And as we were approaching the front door, I noticed [Carmen] . . . [¶] As we walked by, I just heard her say something about Patton or how he was transferred to a -- to something like. That [*sic*] paid no attention. I didn't comment on it. [¶] Juror No. 11 then said to me, 'Did you hear that? That was the defendant's mother, and that was not cool what she said.' And I said, 'No, I didn't hear what she said, but just forget it.' " The alternate juror said what he had heard would not cause him to be biased because "I really didn't hear anything."

When the trial court asked for the parties' input, defense counsel – noting the alternate juror's report that Juror No. 11 had commented on Carmen's remark – said: "I am wondering if Juror No. 11 -- if we have to re-ask her, see if [she] took the mom's comments as being prejudicial towards Mr. Erickson, and if she thought that Mrs.

Erickson was intentional in terms of her conduct or her statements." The trial court replied: "Well, the court already voir dired her and asked whether or not she could remove those thoughts. I believe she indicated that she could -- she also indicated and [*sic*] formed no basis in her deliberation. [¶] I think we already approached that, and the court is satisfied that there is no prejudice to either side. It is not necessary to remove . . . the individuals who indicated they heard something."

Erickson contends the trial court should have inquired further of Juror No. 11 because of the report she had made the "derogatory" statement that Carmen's remarks were "not cool," and because she then "failed altogether to disclose this attitude about appellant's mother's comments when questioned by the court." Erickson argues Carmen gave critical testimony about how warm it had been that night, and thus that it mattered very much if a juror developed a negative attitude towards her due to extrajudicial information.

There was no error. (See *People v. Miranda* (1987) 44 Cal.3d 57, 117-118, disapproved on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4 [juror misconduct not ground for new trial where "misconduct was of such a trifling nature that it could not . . . have been prejudicial"].) Juror No. 11's overall comments – including her "derogatory" statement to the alternate juror – demonstrate she was well aware extrajudicial statements could not be considered as evidence. The assertion that Carmen's testimony about the weather was "critical" is far-fetched; that testimony related to a rather minor point about whether the Erickson brothers were wearing unnecessarily warm clothing as a kind of body armor. As for the substance of what was overheard –

apparently something to do with Leroy receiving treatment for a mental disorder – the jury had already heard from both Carmen and Rosalie (and would later hear from Erickson himself) that Leroy came out of prison with severe mental problems.

5. *Unanimity instruction.*

Erickson contends the trial court erred by failing to give the jury a written unanimity instruction in connection with the charge of making a terrorist threat in violation of section 422. This claim is meritless.

Erickson claims the trial court should have given CALJIC No. 17.01 (where the prosecution introduces evidence tending to prove more than one act on which a conviction may rest, the jurors must all agree defendant committed the same act) because the three possible victims of the alleged terrorist threat gave slightly different testimony, with Alex saying Erickson threatened to kill only him, while Geraldo and Jose said Erickson had threatened everyone, and because Alex said he had not taken Erickson's threat seriously.

There was no need for a unanimity instruction, which is not generally required where the acts are so closely related as to form part of a single transaction. (See *People v. Beardslee* (1991) 53 Cal.3d 68, 92-93 [unanimity instruction required only if jurors could otherwise disagree which act defendant committed and yet convict; hence instruction not required where acts were so substantially identical that any juror believing one act took place would necessarily believe all acts took place]; *People v. Crandell* (1988) 46 Cal.3d 833, 875, disapproved on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 593-594 [CALJIC No. 17.01 not required if acts so closely connected they

form one transaction, defendant tenders same defense to each act and no reasonable basis exists for jury to distinguish between them].) "The 'continuous conduct' rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. [Citation.]" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

Erickson offered precisely the same defense to each victim by testifying he simply did not remember threatening anyone. There was no crucial difference in the victims' testimony. Jose and Geraldo testified Erickson threatened to kill everyone who had pushed him out of Geraldo's house and that they took the threats seriously. Alex did testify at one point that Erickson threatened to kill only him; but he *also* testified that, after making the death threat to him, Erickson told the rest of the group "I am going to come back and get you guys all [*sic*]." Alex explained how Erickson had, in effect, expanded the death threat to include the entire group: "Q. How many times did he threaten to kill you? [¶] A. He just directed himself towards me just one time, saying it twice. [¶] Q. Saying it to the group, also? [¶] A. Yeah. *He directed it to me, but he directed it to everybody when he said he was going [to] get everybody*." (Italics added.) Alex also testified: "At the time, . . . I didn't take it personally. I thought he was just blowing off steam." But despite this testimony, Alex conceded he took the threats seriously enough that, as soon as Erickson left, he and the others searched for things to use as defensive weapons, locked themselves into Geraldo's house, and kept a lookout in case Erickson returned.

In any event, the trial court did give a unanimity instruction, telling the jury it "must agree as to the victim of count 3, Jose [ ], Alex [ ], Geraldo [ ], must agree unanimously as to which of those three if any or all." Erickson acknowledges this, but then complains the written instructions contained no unanimity requirement and argues that "[w]here there is a conflict between oral and written instructions, written instructions govern." It is true that when oral and written instructions *conflict* it is presumed the jury followed the written instructions. (*People v. Osband* (1996) 13 Cal.4th 622, 717.) Here, however, the oral and written instructions did not conflict because there was no written instruction; an omitted written instruction does not create a conflict with a given oral instruction. (Cf. *People v. Ochoa* (2001) 26 Cal.4th 398, 446-447 [no error where written instructions did not include two instructions given orally because there is no federal or state constitutional right to written instructions and statutory right depends on express request].)

6. *CALJIC 17.41.1*.

Morgan contends the trial court erred by giving an anti-nullification instruction (CALJIC 17.41.1) to the jury. This claim is meritless.

In *People v. Engelman* (2002) 28 Cal.4th 436, 449, our Supreme Court concluded this jury instruction was not erroneous: "As we have explained, the Court of Appeal rejected defendant's claim that the giving of CALJIC No. 17.41.1 constituted error, and we agree. Nonetheless, . . . we believe that CALJIC No. 17.41.1 creates a risk to the proper functioning of jury deliberations and that it is unnecessary and inadvisable to incur this risk. Accordingly, in the exercise of our supervisory power [citations], we direct that

CALJIC No. 17.41.1 not be given in trials conducted in the future." Erickson's trial predated *Engelman*.

7. *Parole revocation fine.*

Section 1202.45 provides: "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional restitution fine shall be suspended unless the person's parole is revoked." The failure to impose a section 1202.45 fine constitutes an unauthorized sentence. (*People v. Smith* (2001) 24 Cal.4th 849, 853-854; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1084-1085.) Here, the trial court imposed a $10,000 restitution fine. The People contend, and Erickson concedes, the trial court erred by failing to impose an equivalent parole revocation fine. We shall order the judgment corrected.

DISPOSITION

The judgment is modified to include a $10,000 parole revocation fine under Penal Code section 1202.45. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting this modification and forward it to the Department of Corrections.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.